IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.04.2005

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice S.K.KRISHNAN

H.C.P.No.1289 of 2004

Mohammed Haneefa .. Petitioner

-vs-

1. State of Tamilnadu rep. By
   Secretary to Government,
   Public (SC) Department,
   Fort St.George,
   Chennai - 9.

2. Union of India,
   rep. By Secretary to Government,
   Ministry of Finance,
   Department of Revenue,
   COFEPOSA Unit,
   New Delhi 110 001. .. Respondents

Petition filed under Article 226 of the Constitution of India to issue a Writ of Habeas Corpus calling for the records of the first respondent made in G.O.No.SR.1/1170-4/2004 dated 23.09.2004, quash the same and direct the respondents to produce the body of the detenu Mohammed Haneefa Rahmathali son of Mohammed Haneefa presently detained in Central Prison, Chennai, before this Court and set him at liberty forthwith.

For Petitioner : Mr. B.Kumar, Senior Counsel
for Mr.R.Loganathan

For Respondents : Mr. A.Kandasamy,
Addl.P.P. for R1
Mrs. Vanathi Srinivasan,
A.C.G.S.C. For R2.

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O R D E R

(Order of the Court was delivered by P.SATHASIVAM, J.)

The father of the detenu by name Mohamed Hanifa Rahumathali, challenges the order dated 23.09.2004 passed by the first respondent detaining his son Mohamed Hanifa Rahumathali, under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA in short).

2. Heard Mr.B.Kumar, learned Senior Counsel appearing for the petitioner and Mr. A.Kandasamy, learned Additional Public Prosecutor for the first respondent and Mrs.Vanathi Srinivasan, Additional Central Government Standing Counsel for the second respondent.

3. Though several contentions have been raised questioning the impugned order of detention, learned Senior Counsel for the petitioner at the foremost submitted that the detaining authority has erred in relying upon Section 123 of the Customs Act and for having cast the burden of proof on the detenu. According to him, it is impermissible and in the proceedings of preventive detention, Section 123 of the Customs Act can have no application. In support of his above contention, he relied on the earlier Division Bench decision of this Court in the case of Gunasundari vs. State of Tamil Nadu, etc., and another reported in 2003-2-L.W.(Crl.)884.

4. On the other hand, learned Additional Public Prosecutor appearing for the first respondent, after taking us through the grounds of detention would submit that the detaining authority is fully justified in relying on Section 123 of the Customs Act and the decision relied on by the learned Senior Counsel for the petitioner is not applicable to the case on hand and the same is distinguishable on facts.

5. We have carefully considered the materials and perused the grounds of detention as well as the rival contentions.

6. In the affidavit filed in support of the above petition, in paragraph No.10, a specific point has been raised stating that the detaining authority has erred in relying upon Section 123 of the Customs Act and for having cast the burden of proof on the detenu. It is also stated that it is impermissible and in the proceedings of preventive detention, Section 123 of the Customs Act can have no application and the detaining authority has not formulated the grounds after due application of mind. It is further stated that non application on the part of the detaining authority is patent.

7. With reference to the said claim, the first respondent in his counter affidavit, in paragraph No.10, after referring to Section 123 of the Customs Act and other connected provisions has observed that,

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"...Thus, the above said onus lies on the detenu to prove the licit nature of the gold jewellery seized from him which he had not discharged as he confessed that he had brought them in the manner above said for and on behalf of a third party as a paid carrier thereby, clearly admitted that the said gold jewellery did not belong to him. Further, the goods being brought by the detenu as a passenger from abroad, he is required to be cleared by Customs and all the provisions of the Customs Act, 1962 are applicable to him. However, the detention order passed against him is under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for the act of smuggling consciously indulged in by him under the Customs Act, 1962. In the circumstances, the contention that the detaining authority has also erred in relying upon section 123 of Customs Act and for having cast the burden of proof on the detenu and that it is also impermissible and in the proceedings of preventive detention section 123 can have no application is untenable".

The above reference in the counter affidavit makes it clear that the inference under Section 123 of the Customs Act was very much relied on by the Detaining Authority.

8. Now, let us consider the relevant statement made in the grounds of detention. In paragraph No.1(vi), the following averments have been made.

"... Further, an Indian passport holder who has stayed abroad for not less than six months is only permitted to import gold in any form from abroad and clear the same on payment of appropriate duty at the applicable rate in convertible foreign exchange. Gold brought by a non-eligible passenger is deemed to be prohibited goods as per Section 2(33) of the Customs Act, 1962. Besides, gold is covered under Section 123 of the Customs Act, 1962 whereby the onus of proving that such gold is not smuggled one lies on the person from whose possession the same were seized. Therefore, such goods when brought by a passenger in contravention of the above legal provisions and without making a proper declaration are liable to confiscation under Section 111(d), 111(1) and 111(m) of the Customs Act, 1962 read with Sections 2(33), 11 and 123 of the Customs Act, 1962, Para 2.20 of the Export & Import Policy for 2002-2007, Section 3(3), 5 and 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 and the said passenger is liable to penal action under Section 112 of the Customs Act, 1962 and punishment under Section 132 and 135 of the

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Customs Act, 1962."

Again in the same paragraph it is stated:

> "... Therefore, the gold jewellery of foreign origin totally weighing 954gms valued at Rs.5,42,826/- and 31 Nos. Nokia 6610i model cellphones of foreign origin valued at Rs.2,63,500/- (CIF) (market value Rs.4.34 lakhs) are liable to confiscation under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962 read with Sections 2(33), 2(39), 11 and 123 of the Customs Act, 1962, Para 2.20 of the Export & Import Policy for 2002-2007, Section 3(3), 5 and 111(1) of the Foreign Trade (Development & Regulation) Act, 1992 and you are liable to penal action under Section 112 of the Customs Act, 1962 and punishment under Section 132 and 135 of the Customs Act, 1962."

The reading of the same makes it clear that the grounds of detention proceed on the presumption that the onus of proving that the gold is not smuggled one lies on the person from whose possession the same were seized. In this regard, learned Senior Counsel for the petitioner brought to our notice the earlier Division Bench decision of this Court, namely, 2003-2-L.W.(Crl.)884 (cited supra) (one of us S.K.K.,J. is a party).

9. One of the contentions raised before the earlier Division Bench of this Court is that the Detaining Officer has no power to invoke the presumption under Section 123 of the Customs Act, 1962 in violation of Articles 21 and 22(5) of the Constitution of India and thereby, the subjective satisfaction of the detaining authority is vitiated. While considering the said submission, the Division Bench, before giving their answer, relied on the decision of the Constitution Bench of the Supreme Court, in the case of Collector of Customs v. Sampathu Chetty, reported in (AIR 1962 S.C.316). In that decision, the Constitution Bench has considered the vires of Section 178A of the Sea Customs Act, 1878, which placed the burden of proving on the person in possession of the goods. After referring the same, they concluded that this result follows only on an order of adjudicating officer who investigates into the complaint regarding the possession of smuggled goods and they further held that,

> "Nevertheless, it is manifest that at the stage of adjudication (when only the rule of evidence laid down by this Section comes into operation), the very facts which led the seizing officer to effect the seizure as distinguished from their significance as affording reasonable belief for the seizing officer to hold that the goods are smuggled are before the adjudicating officer."

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Placing reliance on the same, the Division Bench has concluded,

> "It might be that the entirety of the evidence which conceivably, in several cases, consists of information communicated by informers, might not be made available to the person affected, but still the adjudicating officer would have to satisfy himself that the requirement of Section 178A had been complied with before invoking the presumption laid down by that Section. Therefore, the seizing officer's reasonable belief has to be tested before the adjudicating officer or even at the stage of appeal or revision. The detaining authority, while subjectively satisfying himself on invoking the power of COFEPOSA, cannot be permitted to say that the detenu failed to discharge the burden and that he cannot avail of the presumption drawn by the customs officer in his favour.
>
> 11. The said provision has not been incorporated in the COFEPOSA so as to invoke the jurisdiction for detention by applying the provisions of Section 123 of the Customs Act, 1962. Therefore, on the failure of the detenu to discharge his burden that the goods seized are not smuggled goods or that the seizing officer had a reasonable belief that they were smuggled goods are matters that cannot be applied in the case of preventive detention. The detaining authority cannot import the reasonable belief of the seizing officer for the purpose of holding the detenu liable. The finding of the detaining authority by invoking Section 123 of the Customs Act, 1962 and proceeding on that basis for passing the detention order without even giving an opportunity to the detenu is in violation of Articles 21 and 22(5) of the Constitution of India."

10. The Division Bench has also relied on the subsequent judgments of the Supreme Court, in the case of Shalini Soni v. Union of India, reported in (1980 Crl.L.J.1487). The following conclusion is also relevant.

> "... It also means that the detenu is to be informed not merely of the inferences of fact but all the factual materials which have led to the inferences of fact. If the detenu is not to be so informed, the opportunity so solemnly guaranteed by the Constitution gets reduced to an exercise in futility. In this case, the inference drawn by the seizing officer cannot be imported to that of the detaining authority and the burden of proof will not be available and cannot be invoked while passing the order of detention without any materials whatsoever."

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11. Though the learned Additional Public Prosecutor vehemently contended that the said decision of the earlier Division Bench referred to above is not applicable to the case on hand, on going through the brief facts which were stated in paragraph No.2 of the order, we are unable to accept the objections raised by him. On the other hand, as rightly pointed out, the very same contention had been raised before the earlier Division Bench, namely, with reference to presumption under Section 123 of the Customs Act in preventive detention case and after considering the law laid down by the Constitution Bench of the Supreme Court, the Division Bench of this Court has concluded that the presumption under Section 123 of the Customs Act cannot be applied to preventive detention under COFEPOSA, whereas, the same is applicable before the adjudication officer.

12. On going through the relevant paragraphs in the grounds of detention which we have already extracted, we are in respectful agreement with the view expressed in the earlier Division Bench decision and hold that the detaining authority while subjectively satisfying himself on invoking the power of COFEPOSA cannot be permitted to do so when the detenu failed to discharge the burden and that he cannot avail of the presumption drawn by the customs officer in his favour. We also hold that the inference drawn by the seizing officer cannot be imported to that of the detaining authority and the burden of proof will not be available and cannot be invoked while passing the order of detention without any materials whatsoever. In such circumstances, we hold that the impugned order of detention in this Habeas Corpus petition is liable to be set aside and it is accordingly set aside. The HCP is allowed and the respondents are directed to release the detenu forthwith unless his detention is required in any other case.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

gms

To

1. The Secretary to Government,
   State of Tamilnadu ,
   Public (SC) Department,
   Fort St.George, Chennai - 9.

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2. The Secretary to Government,
   Union of India, Ministry of Finance,
   Department of Revenue,
   COFEPOSA Unit, New Delhi 110 001.

3. The Superintendent,
   Central Prison, Chennai - 3.

4. The Joint Secretary to Government
    Public (Law and Order)
   Fort St.George, Chennai - 9.

5. The Public Prosecutor,
   High Court,
   Madras 104.

6. The Sub Assistant Registrar,
   COFEPOSA, High Court,
   Madras.

+ 1 CC to Mr.R.Loganathan, Advocate SR NO 18189

+ 1 CC to Mrs.Vanathi Srinivasan, Advocate SR NO 18452

H.C.P.No.1289 of 2004
18.04.2005

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